STATE OF MICHIGAN

COURT OF APPEALS

R D VERLEGER INVESTMENTS INC,[1]

Plaintiff/Counter-Defendant,

v

GLEN CAIN INC,

Defendant/Counter-Defendant/Cross-Plaintiff-Appellee/Cross-Appellant,

and

BARBARA SMOCK,

Defendant/Counter-Plaintiff/Cross-Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
April 19, 2007

No. 266027
Isabella Circuit Court
LC No. 02-001889-CH

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

In this case involving obligations under an oil and gas lease, cross-defendant, Barbara Smock, appeals as of right the trial court's June 10, 2003, order denying summary disposition of the cross-claim brought against her by cross-plaintiff, Glen Cain, Inc. On cross-appeal, Glen Cain argues that the trial court erred by failing to summarily dispose of all of Smock's counterclaims against it. Glen Cain also appeals the trial court's voluntary dismissal order, arguing that the trial court abused its discretion by including conditions in the order, and it appeals the trial court's order denying it costs and attorney fees. We affirm.

This appeal arises out of a civil action filed by R D Verleger Investments, Inc against Glen Cain. Smock and eight other parties were later added as third-party defendants. After Smock was added as a party, Glen Cain brought a cross-claim against her and two other third-

[1] R D Verleger Investments, Inc is not a party to this appeal.

party defendants. With the exception of Glen Cain and Smock, the other parties settled their claims. After the settlements, Smock filed a counterclaim against Glen Cain. Both Glen Cain and Smock moved for summary disposition on the outstanding cross-claim and counterclaims. After the trial court made various decisions and allowed one issue related to Smock's counterclaim to proceed to a jury trial, Glen Cain moved to voluntarily dismiss its cross-claim.

Smock's first argument on appeal is that the trial court erred when it determined that the oil and gas lease was still in effect. She argued that the lease terminated when Glen Cain failed to properly pay a shut-in royalty. Although Smock raised the issue of the lease's validity in her motion for summary disposition of Glen Cain's counterclaim, the trial court never decided whether the oil and gas lease remained in effect. Instead, the trial court determined that the validity of the lease was an issue for trial. This Court has jurisdiction over final judgments and final orders. MCR 7.203. Because the trial court never decided the issue, it is not properly before this Court, see *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994) (noting that appellate review is limited to issues actually decided by the trial court), and we decline to address it.

Smock's second argument is that the trial court erred when it granted summary disposition in favor of Glen Cain on the issue of mutual mistake of fact. We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo, and, on review, must consider the pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 41-42; 672 NW2d 884 (2003). If the nonmoving party fails to establish that a material fact is at issue, the motion is properly granted. *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).

In order to obtain reformation of a written instrument on the grounds of mistake, that mistake must be mutual and common to both parties to the contract. *Stevenson v Aalto*, 333 Mich 582, 589; 53 NW2d 382 (1952). In *Dingeman v Reffitt*, 152 Mich App 350, 355; 393 NW2d 632 (1986), quoting *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 24; 331 NW2d 203 (1982), this Court stated:

> A contractual mistake 'is a belief that is not in accord with the facts.' 1 Restatement Contracts, 2d, § 151, p 383. The erroneous belief of one or both of the parties must relate to a fact in existence at the time the contract is executed. That is to say, the belief which is found to be in error may not be, in substance, a prediction as to a future occurrence or non-occurrence.

The party seeking reformation must establish a mutual mistake by convincing evidence. *Stevenson*, *supra* at 589.

In her countercomplaint, Smock alleged that the parties made a mutual mistake of fact when they entered into the lease because they assumed that brine was a waste product rather than a valuable commodity. It is clear from the lease that, at the time the parties executed the lease, they intended to make an agreement concerning the development and operation of an oil and gas well. In doing so, Smock granted Glen Cain, as the successor-in-interest to the lease, the right to use her land "for the purposes of exploring by geophysical and other methods, drilling, mining, operating for and producing oil and/or gas . . ." and the right to "lay pipelines, build roads, drill,

establish and utilize wells and facilities for disposition of water, brine or other fluids." The lease defines "operations" as "preparing location for drilling, drilling, testing, completing, equipping, reworking, recompleting, deepening, plugging back or repairing of a well in search for or in an endeavor to obtain production or oil and/or gas, and production of oil and/or gas whether or not in paying quantities." Hence, the lease plainly allows Glen Cain to dispose of brine if the well was "operating for and producing oil and gas."

In order for a mutual mistake to occur, one or both of the parties must have an erroneous belief related to a fact in existence at the time the contract is executed. *Dingeman, supra*. There is no evidence that the parties were mistaken about the nature of the brine or its value at the time the lease was executed. Although the lease treats the oil and gas as the primary commodity, it also contemplates the removal and disposal of brine. Hence, although brine is typically considered a waste product, the parties may very well have contemplated that the brine would have some residual value. Furthermore, even if the brine became more valuable after the execution of the lease, an unforeseen future event cannot be the basis of a mutual mistake of fact. See *Dingeman, supra* at 355. For the same reason, the fact that the well ended up producing significantly more brine than oil cannot support a claim of mutual mistake. Because Smock failed to produce evidence that the parties entered into the lease under a mutual mistake regarding the value of the brine, see *Stevenson, supra* at 589, summary disposition in favor of Glen Cain was appropriate.

On cross-appeal, Glen Cain raises three issues. Its first argument is that the trial court erred by denying complete summary disposition on Smock's counter-complaint and allowing the jury to determine whether the well was producing either oil or gas. Glen Cain does not have a right to appeal the decision. Although the lower court denied Glen Cain's motion for summary disposition, the jury ruled in its favor on this issue. Only a party aggrieved by a decision has a right to appeal a court's decision. *Ford Motor Co v Jackson*, 399 Mich 213, 225; 249 NW2d 29 (1976). A successful party who has been granted full relief is not entitled to a review of alleged defects in the proceedings on which the judgment is founded. *Id.* Here, Glen Cain is not an aggrieved party. It prevailed in the lower court. Therefore, there is no error warranting relief.

Glen Cain's second argument on cross-appeal is that the trial court abused its discretion when it refused to award costs and attorney fees. Glen Cain moved for costs and attorney fees in two separate motions: one under MCR 2.405 and the other under MCR 2.114. The trial court denied both motions.

Interpretation of a court rule is a question of law, which is reviewed de novo by this Court. *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 598; 552 NW2d 523 (1996). This Court will not reverse a trial court's decision to award sanctions under MCR 2.405 unless there was an abuse of discretion. *JC Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996). A trial court will be found to have abused its discretion if it selects an outcome that is not reasonable or principled. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court's finding that an action is frivolous under MCR 2.114 is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

MCR 2.405 is the rule governing offers to stipulate judgment. It requires trial courts to tax actual costs to the party who refuses to stipulate to a judgment, if the verdict is more favorable to the offeror. MCR 2.405(D)(1). However, a trial court may refuse to award attorney fees, if doing so is in the interest of justice. MCR 2.405(D)(3). "'[A]bsent unusual circumstances,' the 'interest of justice' [exception] does not preclude an award of attorney fees under MCR 2.405." *Luidens v 63rd Dist Court*, 219 Mich App 24, 32; 555 NW2d 709 (1996). "Factors such as the reasonableness of the offeree's refusal of the offer, the party's ability to pay, and the fact that the claim was not frivolous 'are too common' to constitute the unusual circumstances encompassed by the 'interest of justice' exception." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 391; 689 NW2d 145 (2004), quoting *Luidens, supra* at 34-35. However, if an offer is made out of "gamesmanship . . . rather than as a sincere effort at negotiation," or when the litigation of the case affects the public interest or is a case of first impression, the exception may be applicable. *Luidens, supra* at 35; see also *Derderian, supra*.

In this case, Glen Cain offered to stipulate judgment on Smock's counterclaim in her favor and pay Smock $100 in damages. Smock refused the offer, and the jury returned a verdict in favor of Glen Cain. The trial court applied the "interest of justice" exception and, relying on *Luidens, supra* at 32, found that Glen Cain's offer was not legitimate. Therefore, it denied Glen Cain's motion for attorney fees.

The trial court properly invoked the interest of justice exception. Although Glen Cain prevailed at trial on the counterclaim, its $100 offer was a small fraction of the damages sought by Smock. Glen Cain's offer evidences gamesmanship rather than a sincere offer to negotiate. The parties spent years in litigation and each incurred costs and attorney fees in excess of $20,000. To offer $100 to settle after the parties had invested so heavily in the lawsuit was clearly an attempt by Glen Cain to insure recovery of actual costs if they prevailed at trial. Moreover, the damages sought for the sale of the brine well exceeded $100, and if Smock had prevailed on the issue presented to the jury, $100 would have been proven wholly inadequate as an offer. Thus, the trial court's decision to deny attorney fees under MCR 2.405 was within the range of principled outcomes. See *Maldonado, supra* at 388.

Glen Cain also moved for sanctions under MCR 2.114 and maintains on appeal that Smock's counterclaim was frivolous. MCR 2.114(F) provides, "[i]n addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." MCR 2.625 states that, "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." Under MCL 600.2591, an action is considered frivolous if at least one of the following conditions is met: 1) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party; or 2) the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true; or 3) the party's legal position was devoid of arguable legal merit. MCL 600.2591(3)(a).

Here, the trial court found that Smock's counterclaim was not frivolous because she offered documentary evidence that the oil well was a dry hole and argued that the lease should be interpreted to bar Glen Cain from removing and selling brine. Although Glen Cain argues that Smock could have easily discovered that the well was producing oil, the frivolity of the lawsuit must be evaluated at the time it was filed. At the time Smock filed her counterclaim, she possessed a DEQ report classifying the well as a dry hole. Therefore, her counterclaim was

based on a belief that the well was not producing oil. By Glen Cain's own admission, it is only through further discovery that Smock could have ascertained that the well was producing oil. Moreover, Smock's countercomplaint contained a valid legal argument: she argued that the trial court should accept her interpretation of the oil and gas lease. In addition, the fact that the issue of whether the well was producing either oil or gas went to the jury, because conflicting evidence was presented at the summary disposition stage, is further proof that Smock's counterclaim was not frivolous. For the foregoing reasons, we conclude that the trial court did not err when it denied Glen Cain's motion for sanctions under MCR 2.114. See *Kitchen*, *supra* at 661-662.

Glen Cain's final argument on appeal is that the trial court abused its discretion by conditioning the voluntary dismissal of Glen Cain's cross-claim on Smock's receipt of a division order and two checks from Glen Cain for money owed under the lease. A motion to grant voluntary dismissal is addressed to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Davis v Koch*, 118 Mich App 529, 535; 325 NW2d 482 (1982). This Court will not set aside a grant of a voluntary dismissal unless it can be said that the lower court's action was without justification. *Padgitt v Lapeer Co General Hosp*, 166 Mich App 574, 576; 421 NW2d 245 (1988).

MCR 2.504(A)(2) permits a trial court to dismiss an action at the request of a plaintiff upon terms and conditions that the trial court determines are proper. The final choice whether to accept conditions imposed by the trial court is with the plaintiff. *Padgitt, supra* at 578. The trial court found that including the conditions attendant to the voluntary dismissal, as Smock requested, would not prejudice Glen Cain. On appeal, Glen Cain does not argue that the conditions were harmful, only that they were improper. The court rule, however, does not restrict the trial court's power to impose conditions. In fact, the rule grants the trial court broad discretion to impose whatever conditions it finds proper. Glen Cain does not cite any supporting authority for its proposition that the conditions were improper. It had the choice to accept the conditions or proceed to trial. It chose the former. Based on its choice and the broad powers the trial court has to impose conditions, we hold that the trial court properly exercised its discretion when it conditioned Glen Cain's motion for dismissal.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski